Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No. 81-1615

IN THE

Supreme Court of the United States

October Term, 1981

In the Matter of JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,
Appellant,

vs.

JOHNS MANVILLE CORPORATION, *et al.*,
Appellees.

ON APPEAL FROM THE STATE OF NEW YORK
COURT OF APPEALS

MOTION TO DISMISS

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Questions Presented

1. Whether the judgment of the State of New York Court of Appeals is sustainable on an adequate independent non-federal basis where appellant's action would remain time-barred even if a "discovery rule" were superimposed on the New York statute of limitations applicable to the action?

2. Whether there is presented a substantial federal question in an appeal from a judgment of the State of New York Court of Appeals in which that Court declined to superimpose a "discovery rule" on the New York statute of limitations, but instead deferred to Legislature on that subject?

3. Whether, in an action for personal injury or disease allegedly caused by the inhalation of asbestos particles, an appeal to this Court lies from a judgment of the State of New York Court of Appeals affirming the dismissal of action on the ground that the action is barred by the statute of limitations, where it is argued on appeal that the appellant has been denied due process of law by the declination of the Court of Appeals to superimpose a "discovery rule" on the New York application statute of limitations?

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In the Matter of JEANNE STEINHARDT, as Executrix of JAMES McKEE, JR.,

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vs.

JOHNS MANVILLE CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE STATE OF NEW YORK
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MOTION TO DISMISS

Pursuant to Rule 16.1(a) and (b) of the Rules of the Supreme Court of the United States, the appellee GAF Corporation[1] moves to dismiss the appeal taken from a

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[1] Statement pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States:

GAF-Huls Chemie G.m.b.H is the only "affiliate" of appellee GAF Corporation. GAF has no parent company or subsidiaries other than wholly owned subsidiaries.

GAF Corporation is designated in the title as "Ruberoid Company, Division of GAF Corporation". On May 26, 1967, the Ruberoid Co. merged with GAF Corporation (R. 349).

judgment of the State of New York Court of Appeals, on the grounds that the judgment is sustainable on an adequate independent non-federal basis, that the appeal does not present a substantial federal question, and that the appeal is not within this Court's jurisdiction.

Statement of the Case

The complaint (R. 328-338)[2] in this action originally contained three alleged causes of action for personal injury and disease suffered by James McKee, Jr. allegedly as a result of inhalation of asbestos particles from asbestos-containing products and materials manufactured and marketed by the respondents during his thirty years of employment as an insulation worker. The three alleged causes of actions were based upon theories of negligence (first cause of action), strict products liability (second cause of action), and breach of implied warranty (third cause of action).[3] In their answers (R. 339-396) the appellees denied liability and raised various defenses, including the statute of limitations.

The record establishes—and appellant does not now dispute—that Mr. McKee was not exposed to any asbestos-containing material in 1971 or thereafter (R. 98, 272-280, 285, 473-477, 530-533, 537, 538-543, 582-586, 593, 594, 614-615, 637-638, 643.) Thus, Mr. McKee's last inhalation of asbestos particles occurred at least four and one-half years prior to commencement of this action in August, 1975.

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[2] All record references are to the record on appeal in the State of New York Court of Appeals.

[3] In the brief in the Supreme Court, State of New York, Appellate Division, Fourth Judicial Department, appellant conceded that the warranty claim was properly dismissed. Brief for Plaintiff-Appellant at viii, *Matter of Steinhardt v. Johns-Manville Corp.*, 78 A.D.2d 577 (4th Dept. 1980).

Viewing the record most favorably to the appellant, a positive clinical diagnosis of asbestosis was made not later than April 3, 1973, the date of Mr. McKee's discharge from Sisters of Charity Hospital (R. 173). This action was commenced in August, 1975, more than two years and four months after that diagnosis (R. 327).

In June, 1973, more than two years and two months prior to the commencement of this action, Mr. McKee filed his claim for Workers' Compensation that resulted in an award for the same injuries claimed in this action (R. 198).

Summary of Argument

1. Even if a "discovery rule" were superimposed on the New York statute of limitations applicable to this action, the action would remain time-barred. New York law provides that where the time for commencement of an action is computed from discovery of facts, the action must be commenced within two years of discovery. This action was commenced more than two years after such discovery. The judgment therefore should be viewed as being sustainable on an adequate independent non-federal basis, and the appeal should be dismissed.

2. The State of New York Court of Appeals properly deferred to the Legislature to determine whether a "discovery rule" should be superimposed on the New York statute of limitations. This did not result in a denial of due process of law to appellant's decedent. The New York rule is consistent with the traditional rationale behind statutes of limitations, and the rule did not deprive appellant's decedent of a reasonable or adequate time within which to bring suit. The appeal should be dismissed for lack of a substantial federal question.

3. Appellant does not challenge the constitutionality of the statute of limitations, but rather the refusal of the State of New York Court of Appeals to superimpose a "discovery rule" on that statute. The jurisdictional predicate asserted by appellant is lacking, and the appeal should be dismissed.

ARGUMENT

POINT I

The judgment of the State of New York Court of Appeals is sustainable on an adequate independent non-federal basis.

The State of New York Court of Appeals held in this case and in prior decisions that the cause of action accrued[4] at the time of invasion or inhalation and that the action was time-barred, under the applicable statute, three years later. Even if a "discovery rule" had been superimposed by the Court of Appeals, as urged by appellant, the action would still be time-barred. The New York Legislature has provided that where the time within which an action must be commenced is computed from actual or imputed discovery of facts "the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer." N.Y. Civ. Prac. Law §203(f). Under this provision the running of the statute of limitations in this case would have commenced not later than April 3, 1973, the date of the positive clinical diagnosis of Mr. McKee's asbestosis (R. 173),[5] and the time to commence suit would have expired two years later, on April 3, 1975. The action was commenced in August, 1975.

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[4] In the Court of Appeals, appellant noted that the appeal was "no request to invent a novel cause of action or accrual rule". Brief for Plaintiff-Appellant at 18, *Matter of Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008 (1981).

[5] Because Mr. McKee in June, 1973, filed his claim for Workers' Compensation that resulted in an award for the same injuries claimed in this action (R. 198), it is clear that Mr. McKee actually knew of the diagnosis more than two years before this action was commenced.

Thus it would have been time-barred even if a "discovery rule" applied. The superimposition by this Court of a "discovery rule" would not result in reversal of the judgment, and the judgment therefore should be viewed as being sustainable on an adequate independent non-federal basis, and the appeal should be dismissed.

In other words, appellant seeks to have this Court consider an issue which, even if decided in appellant's favor, would not alter the judgment affirming the dismissal of the action. Justice Jackson's comments in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945), bear directly on this consideration:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.

Because this Court's review of the judgment of the Court of Appeals could not result in a reversal of the judgment, appellant in effect requests this Court to render an advisory opinion not affecting the outcome of this case.

POINT II

This appeal does not present a substantial federal question.

Where suit is brought in New York State for lung injury or disease caused by the inhalation of dust, the applicable statute of limitations begins to run when the dust is inhaled, not when the plaintiff claims he became aware of the injury to his lungs. This rule was first enunciated by the State of New York Court of Appeals in *Schmidt v. Merchants Desp. Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936), and was reaffirmed in *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *remittitur amended* 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896, *cert. denied* 374 U.S. 808 (1963), *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979), *Reis v. Pfizer, Inc.*, 48 N.Y.2d 664, 397 N.E.2d 390, 421 N.Y.S.2d 879 (1979), as well as in the instant case. Thus, as noted by a leading commentator even before the instant case was considered by the Court of Appeals, "[i]t is thus the settled New York rule that in personal injury cases, apart from malpractice, the cause of action accrues when the body is invaded, not when the injury is discovered." McLaughlin, New York Trial Practice—Statute of Limitations, NYLJ, January 11, 1980, p. 1, col. 1, at p. 2, col. 3.

Another leading commentator, also writing prior to the judgment appealed from, characterized the rule as follows:

> The rule continues to be that when an inhaled or injected substance eventuates in an injury, the moment of 'accrual' for the purpose of running the statute of limitations is the time of the initial inva-

> sion of the body and not the later time when the damage becomes manifest. *Thornton v. Roosevelt Hospital*, 47 N.Y.2d 780, 417 N.Y.S.2d 920 (May 10, 1979) (5-1 decision).
>
> The rule is traceable primarily to *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936), where the injury was caused by the inhalation of dust more than three years before suit was brought. * * * The later case of *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 237 N.Y.S.2d 714, cert. den. 374 U.S. 808, 83 S.Ct. 1697 (1963), adhered to that view, and the Court of Appeals now decides that if there is to be any overruling, it is "best reserved for the Legislature, and not the courts."

New York State Bar Association, New York State Law Digest at 3 (D. Siegel ed. October, 1979 [No. 239]).

In attacking this rule and attempting to make the argument appear to be substantial and of broad interest, appellant overstates the case in several respects. First, appellant asserts that "[t]here are thousands of asbestos insulation workers throughout New York State and not one of them has *ever* been able to timely file suit." Jurisdictional Statement at 8. There presently are pending numerous asbestos-related disease actions in the state and federal courts in New York State that have not been dismissed as time-barred, and if dismissal of those actions were sought, counsel for the various plaintiffs certainly would be expected to argue that those actions are not time-barred, even under the decision of the Court of Appeals in the instant case.

Second, appellant has cited cases from other jurisdictions that, unlike New York, have chosen to adopt a "discovery rule." Jurisdictional Statement at 9, n. 4.

Those decisions, of course, deal only with the statutes of limitations applicable in those various states. Not one of those decisions is premised upon the due process grounds urged here by appellant.

Third, the citation of *Urie v. Thompson*, 337 U.S. 163 (1949), is calculated to cloak appellant's argument for a "discovery rule" with an aura of constitutional mandate, even though that decision involved no question of constitutional law, but only the issue of when the statute of limitations contained in the Federal Employers' Liability Act begins to run.

The State of New York Court of Appeals has repeatedly stated that if there is to be a "discovery rule" in New York, that change should come from the Legislature rather than the Courts. For example, in *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 219, 188 N.E.2d 142, 237 N.Y.S.2d 714, *remittitur amended* 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896, *cert. denied* 374 U.S. 808 (1963), *supra*, the Court of Appeals stated:

> It is not without reason that change in this area has been thought by us to be the responsibility of the Legislature. Our court has no facilities to inquire into the incidence of hardship cases under the statute, nor the peculiarly legislative prerogative to balance the result of such an inquiry against the countervailing considerations of prudence and social tranquility that are supposed to justify Statutes of Limitations. Moreover, how could we set limits to the right plaintiff would have us grant? Is it for a court to say that there shall be an outside limit of six years? If so, what of the fact that 15 years passed before plaintiff brought this action?

Again in 1979 the Court of Appeals declined to extend a "discovery rule" to strict products liability actions, stating that "[s]uch matter is best reserved for the Legislature, and not the courts." *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 781-782, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979), *supra*. Likewise, in the instant case, the Court of Appeals stated that it "believe[d] it to be inappropriate and injudicious to intrude into an area best suited for legislative scrutiny." Jurisdictional Statement at A-3. Each of these statements shows the Court of Appeals' concern that the Legislature, not the Court, determine whether there should be a rule based on the date of manifestation, date of discovery, date of medical diagnosis, or some other date, and that the Legislature consider the impact of such inevitably diverse circumstances as worker deferred medical examinations, different doctors giving different diagnoses, lung conditions not diagnosed specifically as being related to asbestos exposure, or a specific diagnosis of asbestos disease being made but only a general diagnosis of lung disease being communicated to the worker.

Appellant purports to raise two federal questions, neither of which is substantial or meritorious. Appellant's two due process arguments are that the refusal of the Court of Appeals to impose a "discovery rule" is "at odds with the very *raison d'etre* for statutes of limitations", and that "state statutes of limitation must provide the plaintiff with an adequate, *bona fide* opportunity to bring suit." Jurisdictional Statement at 9-10.

The New York rule is consistent with, rather than "at odds with", the traditional rationale behind statutes of limitations. The purpose of the statute of limitations was discussed by the Court of Appeals in *Schmidt, supra:*

> The Statute of Limitations is a statute of repose. At times, it may bar the assertion of a just claim. Then its application causes hardship. The Legislature has found that such occasional hardship is outweighed by the advantage of outlawing stale claims. * * * [A] cause of action sounding in negligence accrues at the time when through lack of care by an employer, deleterious substances enter the lungs of an employee though the development of consequential damages may be long delayed.

270 N.Y. at 302.

Likewise, in *Schwartz, supra*, the Court of Appeals again discussed the function of the statute of limitations in a similar context:

> Considering the function of a Statute of Limitations as a device for repose, a potential defendant's equities are the same whether the plaintiff knows of his condition or not. Repose is as beneficial to society in the one case as in the other. While the plaintiff's equities are greater in one case, it was presumably pursuant to a determination that the interests of an occasional claimant were subordinate to society's interest in repose that resulted in the Statute of Limitations in the first place. The existence of a discovery provision in the fraud statute bespeaks a legislative judgment that only in fraud cases, by their very nature, were there a sufficient number of unknown wrongs to justify a departure from the general rule. Apparently the rarity of such unfortunate cases in other types of actions did not outweigh the disadvantages of imposing a possible exception to the grant of repose to every person and industry who could be a potential defendant.

12 N.Y.2d at 218.

When previously given an opportunity to pass upon the constitutional issues appellant seeks to raise here,

this Court declined to do so and denied certiorari. *Schwartz v. Heyden Newport Chem. Corp.*, 374 U.S. 803 (1963), *supra.*[6]

This Court, in *United States v. Kubrick*, 444 U.S. 111, 125 (1979), recently commented as follows on the purpose and effect of statutes of limitations:

> It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable. We should give them effect in accord with what we can ascertain the legislative intent to have been.

The potential of injustice to a defendant "being put to his defense after memories have faded, witnesses have died or disappeared, and the evidence has been lost", *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), is at its greatest in the case of an occupational disease where there is no single product, let alone a single event, upon which to focus.

Nor did the New York rule deprive Mr. McKee of a reasonable or adequate time within which to bring suit. The application of the statute of limitations seems especially appropriate here—Mr. McKee had been an in-

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[6] In the petition for a writ of certiorari, it was asserted that the Due Process Clause was violated because "[t]here are no facts in the record showing that petitioner actually sustained bodily injury at or about the time of injection rather than subsequently thereto", because "[a]ny injury petitioner sustained at the time of injection was inherently unascertainable at that time", and because "[t]he case is decided on the pleadings alone, thus, in effect, denying petitioner a hearing on the issue of fact as to when he actually sustained bodily injury." Petition for a Writ of Certiorari at 2-3, *Schwartz v. Heyden Newport Chem. Corp.*, 374 U.S. 803 (1963).

sulation worker for more than thirty years (R. 333) and had been receiving regular medical attention for his lung disease since 1966 (R. 404-405).[7] His own attorney as long ago as 1967 characterized his disease as asbestosis (R. 286). Of course, it matters not how the appellant terms the ailment. (The complaint makes only a general reference to "asbestosis and/or pulmonary fibrosis, and other severe lung diseases" [R. 333].) Surely if the allegations as to causation are correct, that is, if his lung disease was caused by exposure to asbestos products, then that disease is the same disease for which he sought medical attention beginning in 1966.

The appeal should be dismissed for lack of a substantial federal question.

POINT III

No appeal to this Court lies from the judgment of the State of New York Court of Appeals.

Because the appellant has not "drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States", 28 U.S.C. §1257(2), the jurisdictional predicate asserted by appellant is lacking, and the appeal should be dismissed.

Although appellant's jurisdictional statements purports to attack the constitutionality of New York's statute of limitations applicable to this case, N.Y. Civ. Prac. Law §214(5), appellant's attack in reality is not against the statute itself, but against the refusal of the

[7] Indeed, by 1968 Mr. McKee's lung diseases had progressed so far that he was hospitalized and quit smoking cigarettes on the advice of his physician (R. 604-606).

State of New York Court of Appeals to superimpose on the statute a "discovery rule" by judicial fiat. As made clear in the argument to the Court of Appeals, appellant "questions the constitutionality ... of that result", Brief for Plaintiff-Appellant at 29, *Matter of Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008 (1981); appellant does not question the constitutionality of the statute itself. The Court of Appeals in its amendment to the remittitur stated that the question "presented and necessarily passed upon ... under the Constitution of the United States" was "[w]hether the holding that the plaintiff's causes of action accrued and the statutes of limitations commenced when the employment-related exposure to asbestos particles occurred deprived plaintiff of due process of law". Jurisdictional Statement at A-19. The amendment to the remittitur does not state that the question presented and passed upon by the Court of Appeals was whether the statute itself deprived appellant of due process of law. The statute is silent concerning the point at which the statutory time begins, except that it "shall be computed from the time the cause of action accrued". N.Y. Civ. Prac. Law §203(a). It is the Court of Appeals, not the statute, that dictates that the cause of action accrued at the time of exposure rather than discovery.

Because appellant does not challenge the statute as such, but instead the Court's refusal to superimpose a "discovery rule" on that statute, jurisdiction by appeal does not lie, and the appeal should be dismissed. *See Kulko v. California Superior Court*, 436 U.S. 84, 90 (1978); R. Stern and E. Gressman, Supreme Court Practice 164 (5th ed. 1978). Significantly, when these same arguments were made to this Court in 1962, it was by petition for a writ of certiorari, not appeal. *Schwartz v.*

Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *remittitur amended* 12 N.Y.2d 1073, 190 N.E.2d 253, 239 N.Y.S.2d 896, *cert. denied* 374 U.S. 808 (1963), *supra.*

If this Court elects to treat appellant's jurisdictional statement as a petition for a writ of certiorari, the petition should be denied for the reasons stated in Points I and II, *supra.*

Conclusion

For the foregoing reasons, the appeal should be dismissed.

Dated: March 25, 1982

Respectfully submitted,

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Rule 28.1 Statement

EAGLE-PICHER INDUSTRIES, INC.:
Subsidiary: Diehl & Eagle-Picher, G.m.b.H.

OWENS-CORNING FIBERGLAS CORPORATION:
Subsidiary: Owens-Corning Fiberglas Espana, S.A.

Affiliates:
Asahi Fiber Glas Company, Ltd.
Amiantit Fiberglass Industries Ltd.
Bayer Owens-Corning Glasswool
Eurostar, S.A.
Veroc Technology A/S
Scandinavia Glasfiber Aktiebolag
Fiberglas Canada, Inc.
Vitro-Fibras, S.A.
Fiberglas Colombia, S.A.
Polyarm, S.A.
Polyplaster, S.A.

ARMSTRONG CORK COMPANY:
Parent: Armstrong World Industries, Inc.

COMBUSTION ENGINEERING, INC.:
Combustion Engineering, Inc., a publicly owned corporation, and its wholly owned subsidiaries, own 20% or greater stock interest in the following domestic corporations:
CE/MHI Fan Company
Spire Corp.
CE/Studsvick, Inc.
MCES
Combustion Engineering/Neyrpric Hydropower, Inc.
Texas Tempered Glass Co.

The Tyler Wayne Research Corp.
Liberty-Reed
Delhi Foundry Sand Co.
Unimin
Pryor Giggey Company
Buffalo China Clay Co.
D.R. Robertson Pylinter, Inc.
Seaton Engineering Co., Inc.
Tomahawk Power and Pulp Co.
Benton Clay Co.
Basic Ballistics Company
CE/KSB Pump Co., Inc.

PITTSBURGH CORNING CORPORATION:
No listing required.

UNR INDUSTRIES, INC. (named herein as Unarco Industries, Inc.):
No listing required:

AC&S, INC. (named herein as Armstrong Contracting and Supply Corporation):
Statement previously filed.

STANDARD ASBESTOS MANUFACTURING AND INSULATION CO.:
No listing required.

KEENE CORPORATION (named herein as Keene Insulation Co.):
Parent: Bairnco Corporation
Subsidiary: Keene International Sales Corporation
This listing excludes foreign subsidiaries and affiliates that do not do business in the United States.